

CLAYTON UTZ

The Australian Consumer Law

An essential guide for product manufacturers and suppliers
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1 Overview

The Australian Consumer Law (ACL) established a single, national, law concerning consumer protection and fair trading from 1 January 2011.

It has now been in operation for two years, so we are developing a better understanding of how its provisions work in practice. This Guide has been updated to reflect that knowledge.

The ACL imposes statutory obligations upon manufacturers and suppliers of goods in terms of marketing and advertising, product safety, quality guarantees and product liability. It gives regulators, competitors and consumers various statutory causes of action that can be used when a manufacturer's or supplier's conduct contravenes the legislation.

Manufacturers and suppliers of goods are most affected by these parts of the ACL:

Part 2-1: prohibiting unfair practices, misleading or deceptive conduct or conduct likely to mislead or deceive, and unconscionable conduct;

Part 2-3: relating to unfair contract terms;

Part 3-1: prohibiting false representations in relation to the supply of goods;

Part 3-2: which implies certain statutory guarantees into the supply of goods to consumers for which both manufacturers and suppliers are liable;

Part 3-3: which contains provisions relating to safety standards, bans, recalls, safety warning notices and notification obligations;

Part 3-5: which makes manufacturers directly liable for certain losses caused by defective goods; and

Chapter 4: offences.

The purpose of this Guide is to provide manufacturers and suppliers with a practical overview of the ACL.

2 Main features of the ACL

Although the ACL is based on the TPA, there are important differences.

The ACL significantly amended the Trade Practices Act 1974 (Cth) (TPA), and renamed it the Competition and Consumer Act 2010 (Cth). Those familiar with the previous TPA will recognise that the ACL retains much of the substance of the previous law.

Manufacturers and suppliers of goods need procedures to deal with:

- **unfair contract terms** – terms in standard form consumer contracts which are unfair are void. Existing standard form agreements should be reviewed for compliance by manufacturers or suppliers who sell directly to consumers;
- **substantiation notices regarding advertising and other product claims issued by regulators** – manufacturers need to have a system to respond to them within the 21 day deadline;
- **mandatory notification to the ACCC of product-related deaths, serious injuries and illnesses** – these need to be prepared quickly given the two-day deadline, yet carefully considered given they may be admissions of fact (and in particular given the ACCC has the power to issue disclosure notices seeking further information);
- **the guarantee of acceptable quality and the right to reject** – this is new legal standard in Australian law. Manufacturers and suppliers need to have procedures to deal with, for example, requests for information as to whether a defect is a major failure or requests for repairs;
- **disqualification orders for breaches of many consumer protection provisions** – your company's directors need to be educated about the consequence of non-compliance with consumer protection provisions;
- **the regulator's power to issue infringement notices, in effect on-the-spot fines** – does your company have an escalation process and is there a procedure to ensure remedial action is taken promptly;
- **a system of civil penalties** – given the lesser burden of proof that the ACCC must meet to establish breaches, any borderline claims or higher risk products should be reviewed;
- **compensation orders for non-party consumers** – when exercised, this is a powerful remedy for the ACCC to address any systemic breaches, in particular if sought in a class action, as while individual breaches may be of low value, cumulatively the sum involved may be very large;

- **testimonials** – there is a reversal in the burden of proof similar to the reversal of proof that applies to representations as to a future matter (which means that advertisers must hold positive evidence to substantiate any testimonials);
- **requirements regarding express guarantees** – careful wording of express guarantees is needed;
- **review of extended warranties** to ensure they comply with the mandatory wording and also to ensure there is no misrepresentation to the effect that the customer is required to pay for rights they already hold under the statutory guarantees; and
- **issues relating to repairs**
eg. the spare parts and service facilities guarantee especially for importers of goods, extended guarantees, and the wording of repair notices.

3 Manufacturers, consumers, goods and consumer goods

Important definitions and what transactions are covered

There are four key concepts which limit the extent of the operation of the ACL: “manufacturer”, “consumer”, “goods” and “consumer goods”, as defined by the legislation. Each is dealt with below.

The result is that the ACL does not apply to the supply of each and every product. However, because of the way that these key concepts are defined, the ACL will sometimes apply to the supply of goods to businesses, or the supply of goods for commercial purposes.

“Manufacturer”

The term “manufacturer” is defined broadly under the ACL to include both the actual manufacturer, as well as certain entities who are “deemed manufacturers” for the purposes of the Act. As a result, it is possible to have multiple “manufacturers” of the same good. For example, the actual manufacturer (based outside Australia) can be made a party to proceedings brought by a consumer against the Australian importer (who is deemed to be a manufacturer for the purposes of the ACL).

Under the ACL, a manufacturer includes a person who:

- produces goods;
- holds themselves out to the public as a manufacturer of goods;

- allows their name, brand or mark to be applied to goods;
- allows another person to hold them out as a manufacturer of goods; or
- imports goods into Australia, where the manufacturer of the goods does not have a place of business in Australia.

Under the ACL, if goods are imported into Australia “on behalf of” a person, that person is taken to have imported the goods into Australia. The term “import” is not defined, and no guidance is given to the words “on behalf of”. Presumably they require a pre-existing relationship to source or bring goods into the country as an agent or on the part of another. Seemingly the concern in expanding the definition was that some companies, by using import agents to source goods overseas and supply them in Australia, may not fall within the definition of importer. Unfortunately however, the Explanatory Memorandum did not provide any explanation of the amendment’s origins or necessity. To date this question has not been clarified.

“Consumer”

The application of many ACL provisions is limited to consumers. Under the ACL, a person is taken to have acquired particular goods or services as a “consumer” where:

- the amount payable for the goods or services did not exceed \$40,000; or
- the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

The phrase “ordinarily acquired” is not defined by the ACL. In applying a similar definition under the TPA, however, courts have held that goods or services may be of a kind ordinarily acquired for personal, domestic or household use or consumption, even if they are also of a kind commonly acquired for business purposes. This means that, for example, commercial carpet and insulation installed in factories have been held to be goods of a kind ordinarily acquired for personal, domestic or household use or consumption. Similarly to the TPA, under the ACL, a person will be presumed to be a consumer unless the contrary is established.

“Goods”

Under the TPA, the term “goods” was defined broadly. While the application of this definition has sometimes been problematic, it has been carried over into the ACL with a number of amendments.

Under the ACL “goods” are defined to include:

- ships, aircraft and other vehicles;
- animals, including fish;
- minerals, trees and crops, whether on, under or attached to land or not;
- gas and electricity;
- computer software;
- second-hand goods; and
- any component part of, or accessory to, goods.

The ACL expressly includes computer software in its definition of goods. Because the ACL has not included blood and other human products under the definition of goods there is continuing uncertainty as to whether they can constitute “goods” for the purposes of the ACL.

“Consumer goods”

Certain parts of the ACL apply only to “consumer goods”. Most notably, the product safety provisions of the ACL (Part 3-3) and related offences (Part 4-3) apply only to “consumer goods” rather than products generally. Other provisions applying only to “consumer goods” or suppliers of “consumer goods” include provisions relating to lay-by agreements, and repair notices for consumer goods.

The term “consumer goods” means goods that are intended to be used, or are of a kind likely to be used, for personal, domestic, or household use or consumption, and (in circumstances where a recall action has occurred) includes any such goods that have become fixtures since the time they were supplied. Unlike the term “consumer”, there is no upper monetary limit in the definition of “consumer goods”.

The term “likely” has been held by Australian courts to mean something that is a “significant finite probability” or a “real chance”, rather than “more probable than not”.

4 Regulation of representations and conduct

The way goods are marketed and advertised can give rise to claims against manufacturers and suppliers brought by competitors, regulators, as well as consumers. The ACL prohibits misleading and deceptive conduct and false representations in trade or commerce. The remedies available include compensation, an injunction to prevent future conduct, a declaration that statements or representations however made (eg. by use of pictorials) were in contravention of the ACL and corrective advertising.

Misleading or deceptive conduct

A broad prohibition against misleading and deceptive conduct in trade and commerce has been a fundamental part of Australian law since 1974, and this is unchanged under the ACL. The prohibition against misleading or deceptive conduct is contained in section 18 of the ACL.

Section 18(1) refers to “a person” and not just a corporation. This makes clear that employees can be the primary defendant in any litigation, which is important if the company is insolvent. It still applies only to conduct in “trade and commerce”.

Section 18 of the ACL is a comprehensive provision with a wide impact. It does not create liability. Instead, it establishes a norm of conduct from which

a person deviates at their peril. Importantly, the operation of the provision is not limited to consumer protection; it applies to all aspects of “trade or commerce”.

A person can contravene section 18 by either act or omission. For example, a claim that a product does or does not have certain attributes in advertising, marketing or product specifications may give rise to a contravention if the statement is incorrect. Further, if a person makes a representation with respect to a future matter – for example a representation as to a product’s performance – and the person does not have reasonable grounds for making that representation, then the representation will be taken to be misleading.

An omission, or silence, can also be held to be misleading or deceptive conduct. In some cases it might not be necessary to invoke non-disclosure at all where a statement which is literally true, but incomplete in some material respect, conveys a false representation that it is complete.

Until the enactment of civil liability reforms, claims based on misleading and deceptive conduct were frequently pleaded in product liability claims involving an alleged failure to warn, or where the instructions for use were said to be inadequate. This cause of action was abolished

Standard form contracts should be reviewed

in personal injury claims as part of the civil liability reforms in 2006 (with a limited exception provided in relation to smoking or other use of tobacco products).

While a plaintiff can no longer recover damages for personal injury following a contravention of this section, proof of misleading and deceptive conduct or false representations will be relevant in determining whether there has been a breach of a statutory warranty, and/or whether a product is defective under other provisions of the ACL.

Further, the prohibition against misleading or deceptive conduct remains relevant in relation to property damage claims and claims for economic loss.

Unconscionable conduct

It is rare for an Australian court to make findings that a product manufacturer or supplier of goods has engaged in unconscionable conduct. However, it has happened – in a prosecution in 2007, the Federal Court found that the defendants had engaged in unconscionable conduct by falsely promoting a treatment to cancer patients.

The ACL prohibits unconscionable conduct in three circumstances:

- when it is prohibited by the general law and equitable principles;

- in trade or commerce, in connection with the supply of goods or services to another person (the consumer), there being a non-exhaustive list of types of conduct which may be unconscionable; and
- in business transactions in connection with the supply or acquisition (or possible supply or acquisition) of goods or services to another person (other than a listed public company), there again being a non-exhaustive list of types of conduct which may be unconscionable.

Unfair contract terms

Part 2-3 of the ACL introduced an Australia-wide prohibition on unfair contract terms. It does not apply to contracts of marine salvage or towage, a charter party of a ship or a contract for the carriage of goods by ship.

The unfair contract terms of the ACL apply only to standard form consumer contracts. A “consumer contract” is a contract for supply of goods or services (or sale or grant of an interest in land) to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

A term of a consumer contract is void if:

- the term is unfair; and
- the contract is a standard form contract.

The ACL does not define “standard form contract”, however it does say that when determining whether a contract is a standard form contract, the court may take into account such matters as it thinks relevant, but must consider:

- whether one party has all or most of the bargaining power;
- whether the contract was prepared by a party before any discussion;
- whether the other party had an effective opportunity to negotiate terms or in effect whether the contract was presented as a “take it or leave it” proposition (disregarding upfront price and main subject matter of contract);
- whether terms of the contract (disregarding upfront price and main subject matter of contract) take into account the specific characteristic of another party or the particular transaction; and
- any other matter prescribed by the regulations.

If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be so unless another

party to the proceeding proves otherwise.

A term is void if that term is “unfair”. A term is considered unfair:

- if it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- it is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

In determining whether a term is unfair, the court can consider such matters as it thinks relevant, but must take into account:

- the extent to which the term is “transparent” (expressed in reasonably plain language, legible, presented clearly, readily available to any party affected by the term); and
- the contract as a whole.

The ACL provides a list of examples of the kinds of terms in consumer contracts that may be unfair, including:

- terms that permit one party (but not another) to avoid or

limit performance of the contract, terminate the contract, vary the terms of the contract or renew the contract;

- terms penalising one party (but not another) for a breach or termination;
- terms permitting one party to vary the upfront price without the other party's being able to terminate contract;
- terms permitting one party to unilaterally vary the characteristics of goods, services or land;
- terms permitting one party to assign the contract to the detriment of another party without the other party's consent;
- terms limiting one party's vicarious liability for its agents; and
- terms limiting one party's right to sue another party.

A term is not void to the extent that the term:

- defines the main subject matter of contract;
- sets the upfront price; or
- is required or expressly permitted by a law of the Commonwealth, a State or a Territory.

False or misleading representations

Under Part 3-1, Division 1 of the ACL certain types of representations made in trade or commerce in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods and services, constitute a contravention of the ACL.

These include false or misleading representations:

- that the goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- that the good or services are new;
- that a particular person has agreed to acquire goods or services;
- that the goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- about the price of goods or services;
- about the availability of facilities for the repair of goods or of spare parts for goods;
- about the place of origin of goods; or
- about the need for any goods or service.

Of particular interest is the inclusion of a number of provisions prohibiting false or misleading representations that were not contained in the TPA, namely prohibitions on false or misleading representations that:

- purport to be a testimonial by any person relating to goods or services, or concerning a testimonial or a representation that purports to be a testimonial relating to goods and services. In relation to these prohibitions concerning testimonials, the ACL says that a representation is taken to be misleading unless there is evidence to the contrary. However, the provision of evidence is not a substantive defence and that the evidentiary burden does not strictly amount to a reversal of the onus of proof; or
- concern a requirement to pay for a contractual right that is equivalent to any condition, warranty, guarantee, right or remedy (including the guarantee of acceptable quality under the ACL) available at law. Presumably, there will be future litigation concerning the nature of “a requirement” in the context of extended warranties and guarantees. For example, if it is reasonable to expect that electrical goods will last 12 months, there is no need for an extended warranty paid for by the consumer and any requirement to pay for it

would be a breach of the provision.

Pricing

Part 3-1, Division 4 of the ACL includes two specific provisions relating to pricing which require that:

- if multiple prices are displayed at the same time for goods (known as “double stickering”), those goods must not be sold for more than the lowest of the prices. However, businesses have the right to withdraw goods from sale and correct pricing mistakes; and
- a single price must be advertised for goods and not just a component of the price. The single price must be displayed as prominently as other components of the price. The single price includes all charges of any description and any amounts reflecting tax, duties, fees, levies or charges imposed on the person making the representation in relation to the supply (such as GST). Australian courts have previously held under the TPA that any delivery fee must be stated, but does not have to be included in the single price, and that optional extras do not have to be priced.

Damages

The ACL gives a person the right to apply to a court for damages to compensate them for their loss

or damage resulting from a contravention of the ACL.

Under section 236, if a person (the claimant) suffers loss or damage because of the conduct of another person, and the conduct contravened a provision of Chapter 2 or 3 of the ACL, the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention. An action may be commenced at any time within six years after the day on which the cause of action that relates to the conduct accrued.

Given the operation of section 15 of the ACL, section 236 does not apply to breaches of Part 3-2 (Consumer guarantees) and Part 3-5 (Liability of manufacturers for goods with safety defects). Both of these Parts contain an in-built right to compensation, and are discussed below.

Section 236 of the ACL is similar to section 82 of the TPA, however there has been a change in wording. Instead of the provision being triggered where a person suffers loss or damage “by” conduct of another, the words “because of” conduct are used. This raises the question as to whether there has been a substantive change regarding causation under section 236 of the ACL.

In other contexts, courts have been

reluctant to expand the definition of the phrase “because of” beyond its ordinary meaning as an expression of causation. There is authority to suggest that the expression should be taken to imply a causal connection between a reason and an act, but that the reason need not be the dominant or substantial reason for doing the act.

In relation to claims under the equivalent provision of the TPA, section 82, the High Court has made clear in a number of cases that there is no stated limitation on the kinds of loss or damage for which compensation may be recovered.

Injunctions

Part 5-2, Division 2 of the ACL allows a court to grant injunctions with respect to certain contraventions or attempted contraventions of the ACL. An injunction may be granted on application by the regulator or any other person. The court may also grant interim injunctions pending the determination of the application.

The injunctive power is very broad and can either restrain a person from doing an act or require a person to do a particular act if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention, or attempted contravention etc, of a provision

of Chapter 2, 3 or 4 of the ACL.

In the context of an advertising breach, an injunction may require:

- publication of corrective advertising or public announcements;
- implementation of a trade practices compliance program; or
- refunds to consumers of the price of goods and delivery charge.

The power of the court to grant an injunction may be exercised regardless of:

- whether or not it appears to the court that the person intends to continue the conduct;
- whether or not the person has previously engaged in conduct of that kind; and
- whether or not there is an imminent danger of substantial damage to any other person if the person engages in the conduct.

5 Specific protections for consumer transactions – consumer guarantees and warranties against defects

Consumer goods must be of “acceptable quality”

This section covers the protections offered by consumer guarantees and the obligations imposed in relation to warranties against defects.

Part 3-2, Division 1 of the ACL attaches a number of guarantees to the supply of goods and services to consumers. Where these consumer guarantees are not complied with, Part 5-4 of the ACL gives a “consumer” who suffers loss or damage as a consequence of the failure to comply a remedy against the goods supplier and, in some cases, manufacturer.

The provisions do more than just provide consumers with the right to return goods or have them repaired. Equivalent provisions in the TPA have been used to claim compensation in personal injury and product liability claims.

These guarantees cannot be excluded, restricted or modified. However, for goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption, it is possible for a manufacturer or supplier to limit its liability for failure to comply with a guarantee to the repair or replacement of the goods, or the payment of the cost of replacing or repairing the goods, or of acquiring equivalent goods.

Guarantees relating to the supply of goods

There are nine guarantees relating to the supply of goods to a consumer.

(a) Acceptable quality

Australian law has long recognised the concept of “merchantable quality”. That concept has been replaced with the legal standard of “acceptable quality”. Under the ACL, where a person supplies goods to a consumer (except by way of auction), there is a guarantee that the goods are of acceptable quality.

As yet there are no Australian decisions considering the meaning of this term.

Goods are considered to be of acceptable quality if they are as:

- fit for all the purposes for which goods of that kind are commonly supplied; and
- acceptable in appearance and finish; and
- free from defects; and
- safe; and
- durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including

any “hidden defects” of the goods), would regard as acceptable having regard to:

- the nature of the goods; and
- the price of the goods (if relevant); and
- any statements made about the goods on any packaging or label on the goods; and
- any representation made about the goods by the supplier or manufacturer of the goods; and
- any other relevant circumstances relating to the supply of the goods.

There is no breach of the guarantee of acceptable quality when:

- the reason why the goods are not of acceptable quality is specifically drawn to the consumer’s attention before the consumer agreed to the supply. Reasons are deemed to have been specifically drawn to a consumer’s attention if they are disclosed in a written notice that was displayed with the goods and “that was transparent”. “Transparent” is defined, in relation to a document, as being expressed in reasonably plain language, being legible and presented clearly; or
- the consumer to whom they are supplied causes them to become

of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality and they are damaged by abnormal use. The inclusion of “and” suggests that these requirements are cumulative, which means that this exclusion is difficult to satisfy; or

- the consumer before acquiring the goods examines them, and that examination ought reasonably to have revealed that the goods were not of acceptable quality.

In respect of suppliers, a consumer cannot recover damages for any loss or damage “if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after the goods left the control of the supplier.”

There is also no claim against a manufacturer if the goods are not of acceptable quality only because of:

- an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer; or
- a cause independent of human control that occurred after the goods left the control of the manufacturer.

While the existence of these exceptions may initially appear comforting to suppliers and manufacturers, decisions under the equivalent TPA provision indicate that the courts will require clear evidence before they are upheld.

(b) Fitness for any disclosed purpose

The ACL imposes a guarantee that goods be reasonably fit for any disclosed purpose, and for any purpose for which the supplier represents that they are reasonably fit.

A disclosed purpose is defined as a particular purpose (whether or not that purpose is a purpose for which goods are commonly supplied) for which the goods are being acquired by the consumer and that purpose is made known to either the supplier or the manufacturer. That purpose can be made known, either expressly or by implication, to the supplier or “a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made”. It can also be made known to the manufacturer either directly, or through the supplier or the other person.

The guarantee does not apply if the consumer does not rely on, or if it was unreasonable for the consumer to rely on, the skill or judgment of the supplier, the person or the manufacturer.

The example given in the Explanatory Memorandum of a situation in which it may not be reasonable for a consumer to rely upon the skill and judgment of the supplier is where a consumer makes the purpose known to “a checkout operator at a discount department store”. It is not clear from this example whether reliance is thought to be unreasonable because of the nature of the employee (checkout operator) or because the store (discount department store) might influence the price or expected quality of the goods.

(c) Other guarantees

In addition to the above mentioned guarantees, Part 3-2 provides for various further statutory guarantees, including a guarantee of:

- compliance with description;
- correspondence with sample or demonstration model; and
- availability of repairs and spare parts.

The ACL distinguishes between “major” and “non-major” defects, and there are different consumer rights and remedies for each.

Guarantees relating to the supply of services

There are three guarantees relating to services supplied to a consumer that:

- services be rendered with due care and skill;
- if the consumer, expressly or by implication, makes known any particular purpose for which the services are being acquired, there is a guarantee that the services, and any product resulting from the services, be reasonably fit for that purpose; and
- if the time within which the services are to be supplied is not fixed, there is a guarantee that the services be supplied within a reasonable time.

Note, however, that the guarantees do not apply to the supply of a telecommunications service.

The guarantees also do not apply to certain services, namely, services supplied under a contract concerning the transportation or storage of goods for the purposes of a business, trade,

profession or occupation or a contract of insurance.

The guarantee of fitness for a particular purpose also does not apply to supply of services of a professional nature by a qualified architect or engineer but the other guarantees do apply.

Remedies for breach of statutory guarantee

Under the ACL, affected persons have a number of remedies against suppliers and manufacturers if goods do not comply with consumer guarantees. Affected persons include the consumer who acquires the goods, a person who acquires the goods from the consumer and a person who derives title to the goods through or under the consumer.

The remedy available depends on which guarantee has been breached, whether the action is brought against the supplier or the manufacturer, and the nature of the breach – that is, whether it is a major, a non-major failure or a non-major failure that cannot be remedied.

Consumers and businesses alike have struggled to come to terms with their rights and responsibilities respectively in relation to consumer guarantees. This prompted the ACCC to run a campaign in early 2012 which was designed to educate the public about this issue (“Repair, replace, refund”).

Actions against manufacturers (Part 5-4, Division 2)

If an action is brought against a manufacturer, a consumer’s remedy is limited to damages.

A consumer may seek to recover damages against the manufacturer of goods where there has been a failure to comply with certain of the consumer guarantees. The scope of those damages is limited, and importantly an affected person is only entitled to recover damages for any loss or damage suffered because of the failure to comply with the guarantee if it was reasonably foreseeable that the person would suffer such loss or damage as a result of such a failure.

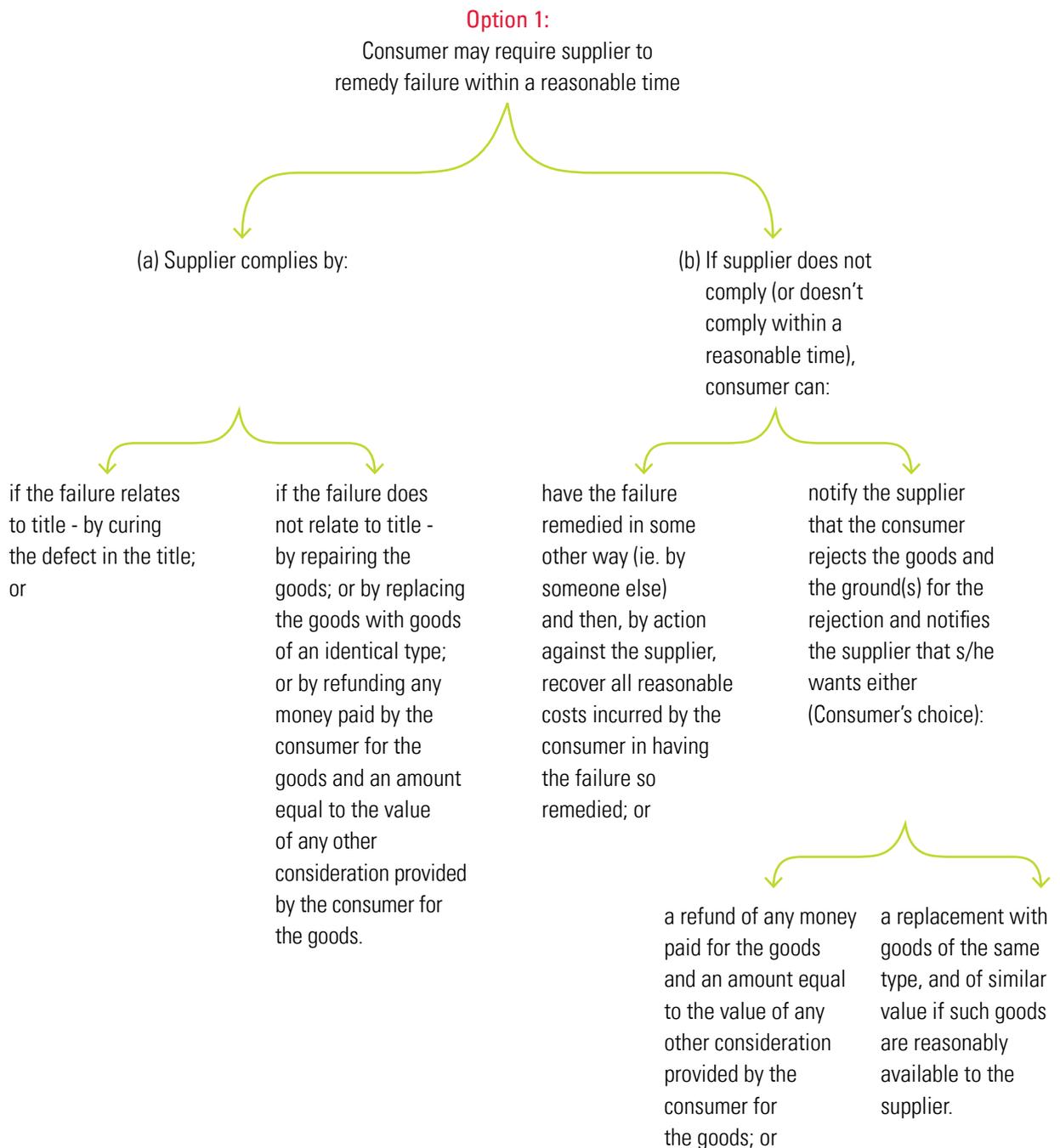
Actions against manufacturers (Part 5-4, Division 2)

A broader range of remedies are available against suppliers. The consumer’s remedy depends on whether there the failure to comply with the consumer guarantee is a “major failure” (or not a major failure but cannot be remedied) or a “non-major” failure.

For major failures (or non-major failure but cannot be remedied), the consumer has two options:

- Option 1: Reject the goods and obtain refund or replacement with goods of “same type” and of similar value if such goods are reasonably available to the supplier; or recover compensation for any reduction in the value of goods below priced paid/payable by consumer for the goods (by action against supplier); and/ or
- Option 2: Recover damages from the supplier upon establishing that it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure

For non-major failures which can be remedied, the consumer has two options:



Option 2:
Consumer may recover damages from the supplier upon establishing that it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure

Similar provisions to these exist in relation to consumers' rights against suppliers of services.

What is a major failure?

The ACL provides a checklist setting out when a failure to comply with a guarantee is a major failure. In short, a failure to comply with a guarantee is a major failure if:

- the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- the goods depart in one or more significant respects from any description, sample or demonstration model;
- the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose;
- the goods are unfit for a disclosed purpose that was made known by the consumer before the supply; or
- the goods are unsafe.

Rejecting goods

If the goods are rejected, the consumer must tell the supplier that the goods are rejected and state the grounds for the rejection. The goods

must also be returned to the supplier. If the goods cannot be returned without significant cost to the consumer, then the supplier must collect the goods at their premises.

This right to reject is lost in some circumstances – if the rejection period for the goods has ended, if the goods have been lost, destroyed or disposed of by the consumer, or if the goods were damaged after being supplied or if the goods have been attached to other property and they cannot be detached without damaging them. If goods are rejected the consumer has the right to choose between a refund or replacement and the supplier has an obligation to comply with the consumer's request.

When must the manufacturer indemnify the supplier?

A manufacturer of goods is liable to indemnify the supplier if the supplier:

- is liable to pay damages to the consumer for loss and damage it has suffered **and** the manufacturer is (or would be) liable to pay damages to the consumer for the same loss or damage;
- incurs costs because the supplier is liable under Part 5-4 (remedies re guarantees) and the failure is any of the following:
 - a failure to comply with the **guarantee of acceptable quality**; or

- a failure to comply with the guarantee as to fitness for any **disclosed purpose** and the consumer made known to the manufacturer either directly or through the supplier or a person by whom any prior negotiations/arrangements regarding the acquisition of the goods were conducted/ made; or
- a failure to comply with the guarantee regarding supply of **goods by description** re a description that was applied to the goods by, or on behalf of, the manufacturer or with the manufacturer's express/ implied consent.

A supplier may commence an action against the manufacturer at any time **within three years** after the earliest of the following:

- the day, or the first day, as the case may be, on which the supplier made a payment with respect to, or otherwise discharged in whole or in part, the liability of the supplier to the consumer;
- the day on which a proceeding was commenced by the consumer against the supplier with respect to that liability or, if more than one such proceeding was commenced, the day on which the first such proceeding was commenced.

Warranties against defects

Under section 102 of the ACL, a person must not:

- give a consumer any document that "evidences a warranty against defects" that does not comply with all of the requirements prescribed for the purposes of section 102(1); or
- represent directly to a consumer that goods or services are "goods or services to which such a warranty against defects relates".

The specific requirements are set out in Regulation 90. These voluntary, express warranties against defects must:

- be expressed in reasonably plain language, legible and presented clearly;
- state the warranty period, procedure for claiming, who bears the cost of claiming the warranty, and that the benefits of the warranty are in addition to other rights and remedies of the consumer under a law in relation to the goods and services to which the warranty relates;
- prominently state the name, business address, telephone number and email address (if any) of the person who gives the warranty; and

- include the following statement:

“Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.”

There are a number of practical difficulties that arise as a result of section 102 and Regulation 90. For example:

- if section 102 is given its full meaning, every document that “evidences” a warranty against defects needs to include the mandatory text above. This is clearly extremely broad and may include product packaging, product brochures, instruction manuals, “how to use” DVDs or CD-ROMs, point of sale material, terms and conditions of sale and satisfaction guarantees. This may require importers to remove a significant number of materials from products they import and replace these with Australia-specific documents before a product can be sold in Australia;

- the application of section 102 to “satisfaction guarantees” is unclear. A typical satisfaction guarantee offers an unconditional refund or replacement to a consumer simply because they are not completely satisfied with the product. As satisfaction guarantees are not conditional on the product being “defective”, it is unclear whether compliance with Regulation 90 is required. This may reduce the extent to which such guarantees are offered; and
- for many types of sale, the prescribed text may be inappropriate – for example in relation to service providers (as the mandatory text contemplates the provision of “goods”), in relation to fixtures or goods returned outside the “rejection period”, and where the prescribed text is contained in a manufacturer’s warranty.

6 Liability of manufacturers for goods with safety defects

Goods have a safety defect if their safety is not such as persons generally are entitled to expect

Part 3-5 of the ACL is based on the EC Directive on Defective Products, 1985 and mirrors the old Part VA of the TPA except that it now refers to "a person" rather than a corporation. Like the consumer guarantees discussed above, the application of these provisions cannot be excluded or modified. These provisions allow a claim to be made against a manufacturer when goods with safety defects cause injury, loss or damage.

If a plaintiff is having difficulty identifying the manufacturer of a defective product, the ACL allows a plaintiff to formally request the supplier to identify the name of the manufacturer that supplied the goods.

Definition of "safety defect"

Goods have a safety defect if their safety is not such as persons generally are entitled to expect. This involves two elements: an expectation and an entitlement to a certain level of safety. The test is objective, based on community knowledge and expectations.

The following factors should be borne in mind:

- The product must be actually unsafe, not just of poor quality or inoperative. Just because goods may cause injury does not mean they are defective. Goods may

be harmful not because of a defect in them but simply because of their inherent nature: "it is a poison that does not do its deadly work that is defective rather than one that does." (Cook v Pasmenco [2000] FCA 677).

- The circumstances to be taken into account in determining the extent of the safety of the goods include the manner in which the goods have been marketed, the purposes for which they have been marketed, packaging, the use of any mark in relation to them, what reasonably might be expected to be done or in relation to them, any instructions for use or warnings and the time when they were supplied.
- An inference that goods have a defect is not to be made only because of the fact that safer goods have been subsequently supplied.
- A product can be held to be defective even if it operates as intended in circumstances where the warnings attached to the product are insufficient to alert consumers of the possible dangers of using the product.
- It may be sufficient for a third party to rely on an inadequate warning, even if the plaintiff has not seen it.

- The plaintiff also need not prove that the defect existed at the time of supply by the manufacturer.
- Under the ACL, a defect must not be inferred only from the fact that after the product was supplied, a safer good was supplied by the manufacturer.
- If there was compliance with a (rare) minimum product safety standard mandated by the Australian Federal Government (not by the States and Territories), and that standard was unsafe at the time of supply, the Government can be substituted as defendant in the proceedings.

for such use or consumption. In other words, liability only follows if both an objective and subjective test are satisfied; and

- loss relating to land, buildings or fixtures ordinarily acquired for private use.

In assessing the level of compensation payable to a plaintiff, the court will take into account the extent to which the acts or omissions of the plaintiff contributed to the cause of the loss. A court may also reduce the amount of the loss to such an extent as it thinks appropriate (including to nil by the express words of the section).

Liability for loss or damage suffered by a person

Under Part 3-5 ACL, a person suffering loss or damage as a result of a safety defect can seek compensation for:

- personal injury (by the injured individual and a person other than the injured individual not as a result of a business relationship);
- death (a compensation to relatives claim);
- loss relating to other consumer goods providing the person harmed (actually or planned to have) "used or consumed" such damaged goods

Defences to defective goods actions

There are a number of defences to a claim under Part 3-5 of the ACL:

- the alleged defect did not exist when the goods were supplied by the manufacturer;
- the goods were defective only because there was compliance with a mandatory standard;
- the state of scientific or technical knowledge at the time the goods were supplied was not such as to enable the defect to be discovered (also referred to as the "development risk defence"); and

- (in the case of a manufacturer of a component part used in the product) the defect is attributable to the design of the finished product or to any markings, instructions or warnings given by the manufacturer of the finished product, rather than a defect in the component.

The wording of the Australian state of the art defence is different from that of the EC Directive. It refers to the state of scientific "or" technical knowledge whereas the EC Directive uses the word "and". A possible consequence is that an issue may arise as to whether the elements of "scientific" knowledge and "technical" knowledge are cumulative or not. In addition, the need for an express "state of the art" defence has been queried. The definition of "safety defect" requires that all relevant circumstances be taken into account, which would presumably include the "state of the art".

As yet, there are no decisions applying Part 3-5 of the ACL.

7 Safety of consumer goods and product-related services and information standards

There's a reporting obligation, but it is not as clear as it should be, and it means extra compliance steps are needed.

Part 3-3 (Safety of consumer goods and product-related services) and Part 3-4 (Information standards) provide the framework for product safety regulation under the ACL. These Parts concern safety standards, specifically, the making of mandatory safety and information standards, bans on consumer goods and product-related services. They also introduced a reporting obligation on suppliers of consumer goods where those goods cause death, serious injury or illness.

If a person suffers loss or damage as a result of a contravention of many of the product safety provisions, because of a defect in, or a dangerous characteristic of, the goods; or because of a reasonably foreseeable use (including a misuse) of the goods, they are taken to have suffered the loss or damage because of the contravention and may claim compensation.

Obligation to notify of serious injury or illness associated with consumer goods or services

One of the most significant changes introduced by the ACL was the imposition upon suppliers of consumer goods and product-related services of a mandatory reporting requirement. If the supplier becomes aware of the death, serious injury or illness of any person, and

- considers that this incident was caused, or may have been caused, by the use or reasonably foreseeable misuse, of the goods or services; or
- becomes aware that a person other than the supplier considers that the incident was caused, or may have been caused, by the use or reasonably foreseeable misuse, of the goods or services,

the supplier has two days to provide the written notification of the incident to the Minister.

Great care is needed in drafting notifications to avoid admissions of fact that products have caused death, serious injury or illness as a result of use (presumably intended use) or foreseeable misuse. Although the ACL provides that reporting is not an admission of any liability, and includes confidentiality provisions, there is no statutory reason why the contents of a notification could not be construed as an admission of fact.

As noted above, the reporting obligation is triggered by four prerequisites:

- the supplier must "become aware". The Senate Explanatory Memorandum says "A supplier 'becomes aware'... when they

are informed or notified about the accident". At common law, the phrase "becomes aware of" is to be read literally and requires actual knowledge;

- there must be a "death or serious injury or illness". "Serious injury or illness" is defined as "an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place)." "Illness" and "injury" are not separately defined. Similarly, the interrelationship of "illness" and "injury" with symptoms and signs is not clear. A symptom is any subjective evidence of disease – blurred vision, headache and fatigue are all symptoms. They are sensations only the patient can perceive. In contrast, a sign is objective evidence of disease – a bloody nose is a sign;
- either the supplier or another person "considers" that the death or serious injury or illness "was caused, or may have been caused" by the consumer good. Causation is essentially a question of fact, and can be resolved as a matter of common sense and experience, considering policy and value judgments; and

- the death or serious injury or illness was caused or may have been caused by the use or foreseeable misuse of the goods. The ACL does not provide guidance to the meaning of foreseeable misuse. "Misuse" means using a product in a manner other than that intended by the manufacturer.

The reporting obligation does not apply if:

- it is clear that the death or serious injury or illness was not caused by the use or foreseeable misuse of the consumer goods;
- it is very unlikely that the death or serious injury or illness was caused by the use or foreseeable misuse of the consumer goods;
- the supplier, or another person, is required to notify the death or serious injury or illness in accordance with a law of the Commonwealth, a State or a Territory that is a law specified in the regulations; or
- the supplier, or another person, is required to notify the death or serious injury or illness in accordance with an industry code of practice that applies to the supplier or other person; and is specified in the regulations.

The Explanatory Memorandum indicates that “very unlikely” means “highly unlikely”. In relation to “it is clear”, the Explanatory Memorandum states; “in other words, where it is certain that the goods were not... a cause”.

The result is that the reporting obligation is far short of comprehensive:

- a serious safety defect is not sufficient in itself; there must be an incidence of death, serious injury or illness;
- the term “medical practitioner” is not defined in the ACL. Presumably it means a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners; the Explanatory Memorandum refers to “a qualified doctor”. If this is correct, treatment by a broad range of other “health professionals” including optometrists, dentists, physiotherapists, pharmacists, first aid officers, and paramedics is not reportable;
- property damage is not a trigger – for example, fires caused by clothes dryers which solely damaged property would not be reportable;
- products which have not yet caused death, serious injury or

illness are not reportable. It is not enough that a product will or may cause injury in the future;

- there is no requirement that non-compliance with a mandatory standard be reported;
- there is no requirement to report extortion or tampering; and
- foreign recalls are not reportable. Therefore, while the supplier must report relevant foreign incidents upon becoming aware of them, there is no obligation to report on a foreign recall action.

Safety standards

The Commonwealth Minister may, by written notice published on the internet, make a safety standard about the following matters as are reasonably necessary to prevent or reduce risk of injury to any person:

- the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of consumer goods of that kind; and
- the testing of consumer goods of that kind during, or after the completion of, manufacture or processing; and
- the form and content of markings, warnings or instructions to accompany consumer goods of that kind.

Standards under other legislation (except for those carried over from the TPA) do not constitute safety standards for the purpose of the ACL.

The supply of goods in contravention of a prescribed consumer product safety standard is prohibited as are exports of non-compliant goods without permission. Suppliers may not supply, offer to supply or possess, manufacture or be in control of goods for the purpose of supply in trade and commerce which do not comply with a standard. The ACCC bears the onus of proving that a particular product does not meet a required standard. Under the TPA, however, the ordinary civil onus of proof applied to such prosecutions.

Information standards

The ACL contains provisions for information standards for both goods and services. An information standard can be made in respect to any subject matter and not for the purpose of consumer health or safety. Standards are to be published on the internet. These standards will often be prepared or approved by Standards Australia International Limited or by an association prescribed by the regulations.

The ACL prohibits the supply of goods or services that do not comply with the requirements of an information standard. However, a supplier can supply goods intended for use outside of Australia, without complying with an information standard. There is a presumption that goods are intended to be used outside Australia if the goods are marked with a statement that they are for export only.

Safety warning notices

All responsible ministers (both State and Commonwealth) may publish a warning notice on the internet warning about particular consumer goods. There is no obligation to consult or advise the importer or manufacturer of the goods before the notice is published.

The notice can contain a statement that the consumer goods are being investigated to determine:

- whether they will or may cause injury; or
- whether a foreseeable use (including misuse) will or may cause injury; or
- a warning of the possible risks with using the consumer goods.

A similar safety warning notice can be issued for product-related services.

If a notice is published to the effect that consumer goods are being investigated, an announcement of the results of the investigation must be published as soon as practicable after the investigation is completed if no urgent interim ban, safety ban or recall notice has been issued. The responsible minister may also publish any action which is proposed to be taken in relation to the goods or the product-related services.

Bans on consumer goods and product-related services

Interim bans can be made by any responsible minister, either State or Commonwealth, and usually last for 60 days although they can be extended. An interim ban may be made when it appears to the responsible minister that consumer goods will or may cause injury to any person; or a reasonably foreseeable use (including a misuse) will or may cause injury to any person; or if another responsible minister has imposed an interim ban and that ban is still in force.

In contrast to interim bans, only the Commonwealth Minister can impose a permanent ban. The prerequisites are that the goods of a particular kind are subject to an interim ban, or it appears to the Commonwealth Minister that: consumer goods of that kind will or may cause injury to any person; or a reasonably foreseeable

use (including a misuse) of consumer goods of that kind will or may cause injury to any person.

Under the ACL it is an offence to:

- supply; or
- offer for supply (other than for export); or
- manufacture, possess or have control of,

consumer goods which are the subject of an interim or a permanent ban.

It is a defence to a prosecution if the defendant proves that the defendant's manufacture, possession or control of the goods was not for the purpose of supplying the goods (other than for export). However, a person must not export banned consumer goods unless approval is first obtained from the Commonwealth Minister.

Similar provisions apply to the supply of product-related services.

Recall of consumer goods

The ACL recognises two sorts of product recalls: compulsory recalls and voluntary recalls. Compulsory recalls are recalls initiated by a responsible State or Federal minister. Voluntary recalls are instigated by a manufacturer or supplier. Compulsory recalls are very unusual in Australia.

The ACL does not give any guidance as to when a recall is necessary.

Voluntary recall

The ACL requires notification of certain recalls to be given to the Commonwealth Minister within two days of taking action:

- when a person takes voluntary action to recall consumer goods because a reasonably foreseeable use (including a misuse) will or may cause injury to any other person; or
- a safety standard for the consumer goods is in force and they do not comply with the standard; or
- an interim or a permanent ban is in force.

The day of the recall itself is not to be included in calculating the number of days, and time cannot expire on a Saturday, Sunday or a public holiday.

Compulsory recall

Under the ACL, a responsible minister may initiate a compulsory recall by issuing a recall notice for consumer goods of a particular kind if it appears to the responsible minister that:

- the goods will or may cause injury to any person;
- a reasonably foreseeable use (including a misuse) of such goods will or may cause injury to any person;
- a safety standard for such goods is in force and the goods do not comply with the standard;
- an interim ban, or a permanent ban, on such goods is in force; and
- one or more suppliers of such goods has not taken satisfactory action to prevent those goods causing injury to any person.

A recall notice for the consumer goods may require one or more suppliers of the goods, or the regulator (if the suppliers are not known), to take specified action which may include one or more of the following:

- to recall the goods; or
- to disclose to the public, or to a class of persons specified in the notice the nature of a defect in, or a dangerous characteristic of, the goods, the circumstances in which a reasonably foreseeable use or misuse of the goods is dangerous, and procedures as specified in the notice for disposing of the goods; or
- to provide an undertaking to do whichever of the following the supplier thinks is appropriate, unless the notice identifies a dangerous characteristic of the goods: repair the goods, replace the goods, or refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods. If it has been more than 12 months since the goods were acquired, the refund amount may be reduced to reflect the use which a person has had of the goods.

If consumer goods are subject to a compulsory recall in Australia, notice must be given by suppliers to any person outside Australia to whom the goods have been supplied.

If a recall notice for consumer goods is in force, a person must not, in trade or commerce, supply consumer goods of the kind to which the notice relates.

8 Offences

Chapter 4 of the ACL makes certain contraventions or attempted contraventions of other provisions of the ACL an offence. Prosecutions for offences under the ACL are to be commenced within three years after the commission of the offence.

Chapter 4 is split into a number of Parts:

- Part 4-1: offences relating to unfair practices in particular false or misleading representations and pricing;
- Part 4-2: offences relating to consumer transactions – but note that breach of the guarantee of acceptable quality is not an offence, although a failure to display a prescribed notice describing consumers' rights is a contravention;
- Part 4-3: offences relating to the safety of consumer goods and product-related services, including breaches of provisions relating to safety or notification standards, bans on consumer goods and product-related services, recalls or notification obligations;
- Part 4-4: offences relating to information standards; and
- Part 4-5: offences relating to substantiation notices.

Notably, contravention of provisions in Chapter 2 (and in particular Part 2-1 (misleading or deceptive conduct) or Part 2-2 (unconscionable conduct)) do not give rise to an offence.

It is also a contravention to aid, abet counsel or procure, induce or attempt to induce a person, be directly or indirectly, knowingly concerned in, or party to, or conspire to contravene a provision.

Defences

A number of defences are provided to offences under the ACL:

- Reasonable mistake of fact:
It is a defence if the contravention was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person.
- Act or default of another person:
It is a defence if the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control and the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

- Publication of advertisements in the ordinary course of business:
It is a defence if the defendant is a person whose business it is to publish or arrange for the publication of advertisements; the defendant received the advertisement for publication in the ordinary course of business; and the defendant did not know, and had no reason to suspect, that its publication would amount to a contravention.
- Supplying goods acquired for the purpose of resupply: In relation to some breaches of the product safety provisions relating to safety and information standards, it is a defence if the goods were acquired for the purpose of resupply and the defendant could not with reasonable diligence have ascertained that the goods did not comply with the standard or relied in good faith on a representation by the person from whom the defendant acquired the goods that there was no safety standard for such goods.

9 Enforcement and prosecution

The ACCC has a number of important investigation and enforcement powers under the ACL. The ACCC can require that claims promoting the supply of goods or services to be substantiated by requiring the person making the claim to provide information or produce documents within 21 days. It is an offence not to comply with a substantiation notice. If a person refuses to respond to a substantiation notice, or fails to respond before the end of the substantiation notice compliance period for the notice, the regulator may issue a public warning notice to the effect that the person has refused or failed to respond to the substantiation notice.

It has long been recognised that not all criminal offences must automatically result in proceedings. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases. A corollary of this is that the available resources are employed to pursue with appropriate vigour those cases worthy of prosecution.

Accordingly, the ACL has provided the ACCC with a number of alternatives apart from criminal prosecution:

- the ACCC can issue an infringement notice for an offence. The maximum amount payable by a corporation is 600 penalty units (\$66,000) but the amount varies depending upon the alleged

contravention, and whether the defendant is an individual, a listed corporation or a body corporate. The amounts of the penalties are significantly less than the equivalent fines or civil pecuniary penalties of up to \$1.1 million. If the fine is not paid, proceedings may be issued. If the fine is paid, the person is not, merely because of the payment, to be regarded as having been convicted of an offence; or

- the ACCC may accept court-enforceable undertakings. Court-enforceable undertakings are an administrative settlement which the ACCC may accept as an alternative to court action or certain other administrative actions. Undertakings have the advantage that they offer a swift resolution to concerns raised by the regulator and may provide a more flexible solution for the parties; or
- a public warning notice can be issued if the regulator has reasonable grounds to suspect that the conduct may constitute a contravention of the ACL, that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct, and it is in the public interest to issue the notice.
- In terms of proceedings, the ACCC has the option of bringing either

a criminal prosecution or seeking a civil pecuniary penalty. A civil pecuniary penalty may be imposed by a court which has found that, at the civil standard of proof (that is, on the balance of probabilities), a breach of the ACL has occurred. Penalties range from \$5,000 to \$1.1 million for a corporation.

There are a number of rules relating to the imposition of fines and civil pecuniary penalties. Notably, preference must be given to compensation for victims: if a court considers that it is appropriate to impose a fine and to order the defendant to pay compensation to a person who has suffered loss or damage as result of that contravention or conduct, but the defendant does not have sufficient financial resources to pay both the fine and the compensation, the court must give preference to compensation.

In addition, a court may:

- grant an injunction with respect to contraventions or attempted contraventions of the ACL to either restrain a person from doing an act or require a person to do a particular act. The ACL expressly recognises that injunctions may be granted restraining a person from carrying on a business or supplying goods or services may be granted, requiring the refund of money

or the destruction or disposal of property;

- make an adverse publicity order that requires the person to disclose or to publish, at the person's expense and in the way specified, an advertisement in the terms specified;
- disqualify a person from managing corporations for a period that the court considers appropriate if the court is satisfied that the person has contravened, has attempted to contravene, or has been involved in a contravention of the provisions of the ACL;
- make a compensation order in relation to a party to compensate the person for loss or damage suffered, or likely to be suffered, as a result of a contravention of the ACL;
- make a non-party compensation order to give redress to persons not named in the proceedings. Redress could include, in this context, refunds, contract variations and non-financial redress such as apologies. In making an order for non-party redress the court may not make an award of damages. This is because it is necessary, in assessing damages, to consider the particular circumstances of the individual to whom the award of damages is to be made. A person is not

obliged to accept redress under a non-party order, but if the person does so, they will forfeit any other right of action they may have;

- make an order directing the person to perform a community service that is specified in the order eg. to undertake a community awareness program;
- direct a person to establish a compliance program or education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations. This could be by way of a training video; and
- require a person to publish, at their own expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order – that is, corrective advertising.

10 Conclusion

The Australian Consumer Law introduced a number of legal concepts which are new. There is uncertainty as to the precise extent of the product incident notification obligation and how the guarantee of acceptable quality works in practice. Presumably there is a specific intention behind the enactment of provisions relating to misleading testimonials and the extended warranty provisions. However, so far there is no reported decision considering their application.

The reforms introduce a number of measures that are likely to have a significant impact on the enforcement of Australian consumer laws. Most importantly, companies lose a number of practical strategic advantages they have had in the past. The reforms mean that the ACCC no longer has to bring lengthy and expensive legal proceedings and establish contraventions to a standard of proof of beyond reasonable doubt.

Budgetary constraints have meant that the number of proceedings the ACCC has been able to commence in the past have been limited by resources. Infringement notices ("on-the-spot" fines) gives the ACCC a way of punishing offences which, until now, may not have been pursued.

In addition, the reforms allow the regulator to issue substantiation notices, which effectively shifts the burden of proof to companies to prove the accuracy of their claims.

In our experience, sponsors of pharmaceuticals and medical devices, as a matter of routine practice, hold documentation which can be used to substantiate the claims made in advertising because of the regulatory environment in which they operate. That said, they may not always be readily accessible at short notice – for example, in respect of a global advertising campaign where the substantiation is held by a foreign related entity. Given the short time period allowed to respond to a substantiation notice (21 days, with a possible extension), companies may find it timely to revisit their compliance procedures to ensure that substantiation is held locally for all claims made in advertising.

Further, the ACCC has been given the right to claim non-party redress for consumers. The absence of this power in the past has meant that the regulator has been restricted in the remedies it could seek in litigation in the past. To date, however, we have not seen this power exercised.

At this stage the precise impact of these reforms on manufacturers or suppliers in the long term is still unclear. However, it is fair to say that these reforms remove some of the obstacles that exist in relation to the ACCC's enforcement powers. As such, and consistent with international trends, we can expect to see the ACCC become a more vigilant and active regulator in the future.

Appendix I - Australian consumer legislation: Quick conversion guide

Representations and conduct		
Misleading and deceptive conduct	section 52	section 18
False and misleading representations	section 53	section 29
Damages	section 82	section 236
Unfair Contract Terms		Part 2-3
Warranties and guarantees		
Supplier warranties	Part V Division 2	-
Actions against manufacturers of goods for breach of statutory warranty	Part V Division 2A	-
Guarantees relating to the supply of goods	Part V Division 2	Part 3-2 Division 1
Guarantee of acceptable quality	-	section 54
Actions against suppliers of goods for breach of statutory guarantees	-	Part 5-4 Division 1A
Compensation		section 259
Right to refuse goods		sections 259(3)(a), 262, 263
Exclusion/modification of liability		sections 64/64A
Actions against manufacturers of goods for breach of statutory guarantees		sections 271-273
Exclusion/modification of liability		sections 276/276A
Liability for defective products		
Liability of manufacturers for safety defects	Part VA	Part 3-5
Definition of safety defect	section 75AC	section 9
Defences to defective goods actions	section 75AK	section 142
Product safety and recalls		
Product bans	section 65C	sections 109 - 118
Compulsory recall of goods	sections 65F, 65H	sections 122- 127
Notification of voluntary recall of goods	section 65R	section 128
Obligation to notify product-related injury	-	section 131
Enforcement		
Offences	Part VC	Part 4-1 Division 1 & Part 4-3.
Defences	section 85	sections 207, 208. Also note, section 226 (honest and reasonable mistake).
Enforcement of undertakings	section 87B	section 218

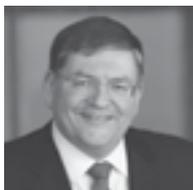
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